1994

State of Utah v. Daryl Pierce : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	Brief of the Appellant
Plaintiff, Appellee,	)	
	)	
v.	)	Case No. 940749-CA
	)	
DARYL PIERCE,	)	
	)	Argument Priority No. 2
Defendant, Appellant.	)	

Appeal from the Seventh District Court, San Juan County, Judge Lyle R. Anderson, presiding.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction pursuant to Rule 26(2)(a) of Utah Rules of Criminal Procedure; Sections 77-1-6(g) and 78-2a-3(2)(f) Utah Code Annotated, 1953, as amended; and Rule 3(a) Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court incorrectly conclude that Pierce, the lawful possessor of vehicle, waived his standing to contest the seizure of the marijuana found in the trunk as the result of his illegal detention?

Utah case law is clear that "a driver who has permission to use a vehicle and has personal belongings in the car has a reasonable expectation of privacy in the car and its contents." State v. Sepulveda, 842 P.2d 913, 916 (Utah App. 1992). Whether defendant has a legitimate expectation of privacy is reviewed "under a correction of error standard, affording no deference to the trial court." State v. Kolster, 869 P.2d 993, 995 (Utah App. 1994) citing State v. Sepulveda, 842 P.2d 913, 915 (Utah App. 1992).

2. Did the trial court incorrectly conclude that Pierce abandoned his expectation of privacy in the marijuana in the trunk by his statement that the only thing that was his was the backpack given the fact the the statement was made in response to a question about the contents of the back seat and at the scene he acknowledged possession of the marijuana?

A. A statement claiming ownership of one item in one area of a vehicle does not constitute abandonment of expectation of privacy in rest of vehicle and its contents. A mere disclaimer of property interest in insufficient to establish abandonment. State v Rowe, 806 P.2d 730,746 (Utah

App. 1991, *rev'd on other grounds*); 850 P.2d 427 (Utah 1992).

B. Intent to abandon is viewed from defendant's state of mind and is a question of intent to voluntarily relinquish a reasonable expectation of privacy, which may be inferred from "words spoken, acts done, and other objective facts". State v. Rowe, 806 P.2d 730, 736.

C. The burden of proving abandonment falls on the state, and must be shown by "clear, unequivocal and decisive evidence". State v. Rowe, 806 P.2d at 736.

D. A trial court's conclusion as to whether defendant had a legitimate expectation of privacy is reviewed under a correctness standard, affording no deference. State v. Kolster, 869 P.2d 993, 995 (Utah App. 1994); State v. Sepulveda, 842 P.2d 913, 915 (Utah App. 1992).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES

Texts set forth in the addendum.

For location in brief please see table of contents.

STATEMENT OF CASE

A. Nature of the Case

This is an appeal from an order denying Pierce's motion to suppress. The case involves a) a traffic stop and a charge of Speeding, a Class C Misdemeanor, in violation of § 41-6-46, Utah Code Annotated, 1953 as amended, and b) a vehicle search and seizure of marijuana resulting in charges of Possession of Controlled Substance

with intent to distribute, a third degree felony, in violation of § 58-37-8(2)(a)(i), Utah Code Annotated, 1953 as amended and Failure to Comply with the Illegal Drug Stamp Tax, a Third Degree Felony, in violation of § 59-19-103, Utah Code Annotated, 1953 as amended (Record 1-2).

B. Course of Proceedings

On April 21, 1994 a preliminary hearing was held and Pierce was bound over on all counts (R. 11-12). On July 29, 1994, Pierce filed a Motion to Suppress and Memorandum in Support (R. 23-38). On August 3, 1994, prosecutor Halls filed a Memorandum in Opposition to Motion to Suppress (R. 67-77).

C. Disposition at Trial Court

On August 5, 1994, a suppression hearing was was held in Seventh District Court with the Honorable Lyle R. Anderson presiding (Transcript 1-73). Said motion was denied, although trial court found that trooper Eldredge did not have reasonable suspicion for continued detention and exceeded scope of traffic stop by detaining and questioning about contraband and requesting consent to search and said consent was not attenuated from that illegality and therefore invalid (R. 81-84). But Court ruled that before any illegality Pierce narrowed his expectation of privacy in the rest of the vehicle and specifically the marijuana in the trunk by his statement that the only thing that was his was the backpack and that he said that intending to make the officer believe that the

backpack was only thing in the vehicle that was his (T. 71-72, R. 81-84). Judge Anderson found that statement to be an abandonment of expectation of privacy and that it was reasonable for the officer to rely on that abandonment (T. 73, R. 84). Findings of Fact and Conclusions of Law and Order Denying Motion to Suppress were filed on August 16, 1994 (R. 80-84).

Pursuant to State v. Sery and Rule 11(i), Utah Rules of Criminal Procedure, Pierce entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress, (T. 74-94) to Possession of Controlled Substance with Intent to Distribute and Failure to Comply with the Illegal Drug Stamp Tax (T. 87-88). Pierce entered a straight guilty plea to Speeding (T. 88). Findings of Fact and Conclusions of Law and Order re Conditional Plea were entered on October 11, 1994 (R. 85-86).

On October 20, 1994, Pierce was sentenced to serve a term not to exceed five years in prison and pay fees and fines in the amount of $1,850.00; the prison term was suspended on condition he serve 60 days in the San Juan County Jail and pay the fees and fines (R. 87-88). On November 28, 1994, Pierce filed an Application for Certificate of Probable Cause with Memorandum in Support arguing that the issues on appeal raised substantial questions of law and fact which are novel or fairly debatable and integral to the dispositive ruling (R. 89-97). On the December 5, 1994, the Certificate of Probable

Cause, staying the judgment pending this appeal, was entered by the trial court (R. 100-101).

D. Facts

On February 17, 1994, Trooper Rick Eldredge (Eldredge), working in San Juan County, Utah on State Road 191, observed and stopped a vehicle for speeding (T. 6-7). The driver, identified as defendant Daryl Pierce (Pierce) was the sole occupant of the vehicle (T. 7). Eldredge informed Pierce that he was stopped because of his speed; Pierce acknowledged going a little fast (T. 7, 32). Pierce produced his driver's license and a traveler's agreement from an auto drive-away company (T. 7, 9). The agreement listed Pierce as the authorized traveler (driver) of the vehicle, however, Eldredge initially "skimmed over it" (T. 9, 21-22). The agreement stated Pierce's route and that he was authorized to travel on Interstate 70 and local roads as needed (T.22, 28, 36). It also stated the driver was to call owner the day before delivery to make appropriate delivery arrangements (T. 36-37). The agreement also listed the VIN number of the vehicle which matched the vehicle stopped by Eldredge (T. 22). During this first portion of the stop, Eldredge observed luggage and golf clubs in the back seat and asked Pierce whose belongings were in the back seat (T. 7-8). Pierce replied that luggage and golf clubs were the owner's and the only thing that was his was the backpack (T. 8).

Eldredge also asked Pierce where he was going (T. 7). There is a dispute about what the officer was told about Pierce's travel plans: Eldredge alleges that Pierce stated one reason for travel and then contradicted himself while Pierce testified he did not give conflicting stories (T. 7, 10, 32-33). Pierce knew the vehicle owner's name, but stated that he was told to take the vehicle to someone else and did not have that name handy (T. 9, 33). Eldredge felt that the story was peculiar, the travel route was strange and Pierce was nervous (T. 10-11).

Eldredge and Pierce then went back to his patrol vehicle for the issuance of a speeding citation and investigative questioning (T. 11-12, 26). While in the process of writing the citation, as Eldredge was suspicious about Pierce (although suspicions did not rise to the level of reasonable suspicion (T. 67)) he asked Pierce if he had any weapons or controlled substances in the vehicle and he replied no (T. 11-12). The uncompleted ticket, along with Pierce's license and paperwork, was put aside and not completed until Pierce was booked at the county jail (T. 12, 16, 19, 25). Pierce was asked to consent to a vehicle search, told he had to sign form before Eldredge could search and he then signed a consent form (T.12-15).

Eldredge began a search of the vehicle, in the front passenger side of the car and worked his way to the back seat; no contraband was found in the passenger area (T. 16). He then popped the trunk and found more luggage,

including two closed duffel bags (T. 16). He opened one of the duffel bags and found what appeared to him to be and was later confirmed as a controlled substance (T. 16). He asked what it contained and Pierce answered marijuana (T. 17). Pierce later stated that the luggage was the owner's and the marijuana was his (T. 17). Pierce was placed under arrest for possession of controlled substance with the intent to distribute and booked into the San Juan County Jail (T. 17).

SUMMARY OF ARGUMENT

The trial court incorrectly concluded that Pierce, the lawful possessor of the vehicle, waived his standing to contest the seizure of the marijuana found in the vehicle's trunk as the result of his illegal detention. As the lawful user of the vehicle, Pierce had "a reasonable expectation of privacy in the vehicle and its contents and" had "standing to challenge the admission of evidence seized" during an unlawful search. State v. Matison, 875 P.2d 584, 239 Utah Adv. Rep. 19, 22 (Utah App. 1994).

The trial court erred in ruling that Pierce abandoned any expectation of privacy in the marijuana in the trunk by his statement that the only thing that was his was the backpack despite the fact that the statement was made in response to a question about the contents of the back seat and he acknowledged possession of the marijuana at the scene.

Pierce's statement did not constitute a waiver of his privacy interest in the vehicle and its contents; even a disclaimer of interest is insufficient to establish abandonment. The trial court erred in using the officer's state of mind rather than the defendant's in determining abandonment and not looking objectively at the words used and the factual situation. The trial judge also erred in not requiring the prosecutor to meet his burden of establishing abandonment which must be shown by "clear, unequivocal and decisive evidence". State v. Rowe, 806 P.2d 730, 736 (Utah App. 1991, *rev'd on other grounds*); 850 P.2d 427 (Utah 1992). Standing and expectation of privacy conclusions are reviewed under a correctness standard and under that standard the trial court's conclusions were incorrect as was his denial of the motion to suppress.

ARGUMENT

There is no case law or legal authority for the trial court's ruling that a statement referring to one item in one part of a vehicle can serve as an abandonment of a legitimate privacy interest in the rest of the vehicle and contents. However, a disclaimer of interest has been held by many courts and legal authorities to be insufficient to constitute abandonment. As the issue of whether the statement about one area can equal abandonment of the rest of vehicle is a novel issue and what factually constitutes abandonment is a fairly unclear area in Utah case law, the

most pertinent analysis, the direct disclaimer analysis will be used.

I. Standing

As a preliminary matter, there is no question that Pierce has standing to object to the search and seizure of his person and that of the vehicle he lawfully possessed. "Although a person has a lesser expectation of privacy in a car than in his or her home, one does not lose the protection of the Fourth Amendment while in an automobile." State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989). Utah case law is clear that "a driver who has permission to use a vehicle and has personal belongings in the car has a reasonable expectation of privacy in the car and its contents." State v. Sepulveda, 842 P.2d 913, 916 (Utah App. 1992). A lawful possessor has "a reasonable expectation of privacy in the vehicle and its contents and, unless waived, has standing to challenge the admission of evidence seized during the search." State v. Matison, 875 P.2d 584; 239 Utah Adv. Rep. 19, 22 (Utah App. 1994).

Whether defendant has a legitimate expectation of privacy is reviewed "under a correction of error standard, affording no deference to the trial court." State v. Kolster, 869 P.2d 993, 995 (Utah App. 1994) citing State v. Sepulveda, 842 P.2d 913, 915 (Utah App. 1992).

As authorized possessor of a vehicle illegally detained by an officer, Pierce has standing to contest the

seizure of the marijuana found in the trunk as the result of his illegal detention. Trial court noted "if defendant has standing then this is going to be suppressed" because "the illegality of detaining to ask for consent is itself not sufficiently attenuative (sic) from the voluntary consent to make the consent valid" (T. 70-71). As Pierce did not abandon or waive his privacy interest he had standing to object to the search and the motion to suppress should have been granted due to his illegal detention.

Trial court correctly acknowledged the case law giving Pierce an expectation of privacy and standing in the vehicle and its contents; however he incorrectly held that Pierce had decreased that expectation by his backpack comment. Trial court noted:

> general statements in the cases that if someone has exhibited the right to have the vehicle and control the vehicle, he has an expectation of privacy in the vehicle or everything in it. And that would ordinarily apply here, but in this case, we have the additional factor that that was narrowed down by the defendant's own statements. He made a statement intending the officer to understand, and the officer did, in fact, understand that the only thing in this vehicle which belonged to someone else, which he would have a brief period of time, was his back-pack. And I find from that -- I'm looking -- I think the proper way to examine that question from the standpoint of what the officer -- I can't expect the officer to predict what will happen after that.

(T. 71). The court erred in finding that the statement constituted abandonment and analyzing the issue from the officer's point of view.

2. Abandonment.

A statement referring to one item in one part of a vehicle is insufficient to establish the abandonment of privacy expectation in remainder of vehicle and contents. A mere disclaimer of ownership does not constitute abandonment. Abandonment must be shown by clear, unambiguous facts viewed from the defendant's state of mind. Prosecution has the burden of proving abandonment and they failed to do so in this case.

A. A Mere Disclaimer of Property Interest is Insufficient to Prove Abandonment.

Many courts and legal authorities have held that it takes more than a denial or disclaimer of interest in questioned property to establish abandonment.

"Abandonment must be distinguished from a mere disclaimer of a property interest made to the police prior to the search, which under the better view does not defeat standing." 4 W. LaFave, *Search and Seizure*, § 11.3(a) at 287 (2d ed. 1987). Illustrative is Commonwealth v. Sandler, 368 Mass. 729, 335 N.E.2d 903 (1975). Police questioned property owner Drew about location which they

believed contained stolen property. Drew referred them to renter Sandler who

> denied renting the premises or storing any property there, after which the police searched those premises with the consent of Drew. The court quite correctly ruled that Sandler had standing to question the search, for it can hardly be said that Fourth Amendment rights evaporate merely because of a failure to make incriminating admissions in response to police inquiries. The disclaimer, therefore, does not defeat defendant's standing.

4 W. LaFave, *Search and Seizure*, § 11.3(a) at 287-88 (2d ed. 1987).

This court has also applied the "better rule" that a mere disclaimer or an ambiguous disclaimer does not constitute abandonment. See State v. Rowe, 806 P.2d 730, 736 (Utah App. 1991, *rev'd on other grounds*); 850 P.2d 427 (Utah 1992) (The Supreme Court held that the search warrant violation did not require exclusion of evidence and therefore did not address the Court of Appeals ruling on abandonment); see also State v. Marshall, 791 P.2d 880, 132 Utah Adv. Rep. 45 (Utah App.), *cert. denied*, 800 P.2d 1105 (Utah 1990).

Rowe involved an invited guest at a home where a no-knock nighttime search warrant was executed. Officers secured the house and gave her permission to leave but since she was not wearing shoes an officer accompanied her

to the bedroom where she retrieved them from a pile of items. State v. Rowe, 806 P.2d 730, 731.

The officer then asked her if she had everything that was hers and she replied that she did. She left, the house was searched and drugs were found. Specifically, a purse was found in the bedroom pile that contained a vial of methamphetamine and documents belonging to Rowe. Later at the police department she admitted ownership of the drugs and purse. The state argued that Rowe abandoned any expectation of privacy when she told the officer she had everything that was hers. State v. Rowe, 806 P.2d at 732.

In deciding whether Rowe had abandoned her expectation of privacy, the court relied upon the "better view" that a mere disclaimer does not defeat standing. 806 P.2d at 736 citing 4 W. LaFave, *Search and Seizure*, § 11.3(a) at 287 (2d ed. 1987). The court found that abandonment had not been proven by that state, but it did not determine whether Rowe's response constituted abandonment. 806 P.2d at 737. The court held that Rowe's "repudiation of interest in property located in the bedroom is consistent with a conclusion of abandonment. It is not, however, inconsistent with a conclusion of a mere disclaimer of interest to avoid self-incrimination." 806 P.2d at 736.

Rowe specifically said she had all her possessions and she left the items under police control whereas Pierce made a statement about one area of vehicle and never physically abandoned the items. Using the above analysis, Pierce

should be found to not have abandoned his privacy expectation in the trunk contents.

Marshall involved a traffic stop where Marshall's rental car trunk was opened, he was asked what was in the suitcase found there, initially replied "clothes" and then said "the suitcases were not his and must have already been in the trunk when he rented the vehicle". State v. Marshall, 791 P.2d 880; 132 Utah Adv. Rep. 45, 46 (Utah App.) *cert. denied*, 800 P.2d 1105 (Utah 1990). The court characterized the above statement as an "ambiguous disclaimer of ownership". Marshall, 791 P.2d 880; 132 Utah Adv. Rep. at 50. The case was remanded for determination of whether defendant had abandoned his privacy interest and the nexus between the police illegality and his abandonment, if any, of expectation of privacy.

The *Marshall* court cited several federal cases where abandonment was found when defendant specifically physically or verbally abandoned or disclaimed the actual item seized, i.e., defendant initially seen with an item and when stopped didn't have item and denied knowledge of it; defendant denied ownership of item located next to him; or defendant disclaimed ownership of the item and walked away. Marshall, 791 P.2d 880; 132 Utah Adv. Rep.at 52, n. 11 (citations omitted). Given the characterization of Marshall's disclaimer as ambiguous and the factual situations that generally constitute abandonment, Pierce's statement clearly does not constitute an abandonment as it

is ambiguous and not a direct specific denial of ownership. Pierce's backpack statement is much more akin to a mere disclaimer than an unambiguous abandonment.

Pierce's failure to volunteer information about the presence of controlled substance before it was discovered (answering in negative when first questioned about contraband) is a patent example of a permissible exercise of his right to avoid self-incrimination Like an ambiguous disclaimer, a failure to make an inculpatory statement is insufficient to show abandonment. "To equate a passive failure to claim potentially incriminating evidence with an affirmative abandonment of property would be to twist both logic and experience in a most uncomfortable knot." State v. Joyner, 66 Hawaii 543, 669 P.2d 152 (1983). See *Isom, infra,* for further Fifth Amendment analysis.

In State v. Isom, the Montana Supreme Court found that despite a state statute that a search could not be held illegal if defendant disclaimed interest in place or object searched or things seized and a despite a denial of ownership of the vehicle by Isom, he had standing to contest search of bags containing marijuana in the trunk of the car. 196 Mont. 330, 641 P.2d 417, 422 (1982). Court held that a mere disclaimer should not give rise to abandonment.

> Given the position that a defendant does not otherwise have to incriminate himself to preserve his Fourth Amendment rights, . . .

> It is difficult to understand how a refusal to make incriminating admissions in response to police interrogation can be held to deprive a person of Fourth Amendment standing.

Isom, 641 P.2d at 422, citing Simmons v. United States (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247. The court using a *Miranda* or Fifth Amendment analysis, stated that "(c)learly, the *Miranda* limitations should apply to disclaimers when the State uses them to deprive a person of Fourth Amendment standing." Isom, 641 P.2d 422.

The Court then looked at defendant's privacy expectation in the specific area searched and held that regardless of the Fifth Amendment limitations on the state statute and even

> assuming that the disclaimer could be construed to deprive the defendant of standing to contest the search of the car, In light of Robbins v. California (1981), 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, the disclaimer could not be construed to deprive the defendant of standing to contest the search of the garbage bags found in the trunk of the car.
>
> In *Robbins* the Court held that while police may have conducted a lawful search of an automobile under the automobile exception, they must nevertheless secure a warrant for any container found in the trunk of the car. The Court recognized that the expectation of privacy in a closed container taken from a car is not necessarily less than the privacy expectation in closed pieces of luggage found elsewhere.

> Following a similar reasoning, it cannot be said that the defendant lost his expectation of privacy in the opaque garbage bags when he disclaimed ownership of the car. While it is arguable that the disclaimer weakened the defendant's expectation of privacy in the car, it cannot be said to have affected his expectation of privacy in the garbage bags. The disclaimer, therefore, in no way affected defendant's standing to contest the search of the garbage bags.

641 P.2d at 422-23.

The Fifth Amendment analysis clearly applies to the answers to questioning about contraband as Pierce at that time was clearly not free to go, however it should also apply to the backpack comment as at that time Pierce was also not free to go, as officer had not given him a citation yet.

Also the closed container analysis is applicable in this case and Pierce should be found to have standing to contest the search of the duffel bag in the trunk containing marijuana. Pierce's case is even clearer as he never made a denial of knowledge about the vehicle as Isom did, in fact, he never made any denial of possession of the vehicle or any contents except the owner's luggage.

In State v. Huether, the North Dakota Supreme Court held that a post search disclaimer did not constitute abandonment. 453 N.W.2d 778 (N.D. 1990). Huether was stopped for speeding, officer detected alcohol, obtained consent to search for open containers, and opened a small

bag partially under the front seat. Huether said it contained garbage, however it was opened and found to contain controlled substance and Huether then denied ownership and knowledge of bag and contents. 453 N.W.2d at 780.

The state argued, as the state and court reasoned in the present case, that by saying "'the bag wasn't his and he didn't know what was inside,' he lost any expectation of privacy in the bag." 453 N.W.2d at 780. The trial court ruled that Huether's denial of ownership, by itself, was not a waiver of Huether's reasonable expectation of privacy in the bag. *Id.* The North Dakota Supreme Court noted that an examination of how defendant treated the article is needed, as a disclaimer:

> is "not necessarily the hallmark for deciding the substance of a fourth amendment claim." In the same way that ownership alone may not be sufficient to confer or retain a reasonable expectation of privacy, . . . disavowal of ownership alone may not be enough to relinquish one's reasonable expectation of privacy. This is especially true where, as here, the paper bag is contained and controlled within an area where there is a legitimate expectation of privacy. Huether did not discard or place the bag in a public place.

453 N.W.2d at 781 (citations omitted).

After reviewing the location from which the container with the contraband was seized and the container itself, the court held:

> There is little doubt that Huether had an expectation of privacy in his vehicle and in every container therein that concealed its contents from plain view. There is no constitutional distinction between paper bags and others kinds of containers. Furthermore, where the disclaimer comes only after the search of the disclaimed article reveals contraband, the disclaimer, made in an effort to avoid making an incriminating statement, should not alone be deemed to constitute abandonment.

Id. at 781 (citations omitted).

Similarly, Pierce should be determined to have an expectation of privacy in the vehicle and the containers (duffel bags) whose contents were not in plain view. His bag was also in an vehicle where he had a legitimate expectation of privacy. His statements also should be found to be insufficient to establish abandonment.

A statement alone is not determinative; court should look objectively at situation and what actually was said and done. In a similar fact situation to the present case:

> accused narcotics offenders were held not to have abandoned a bag containing heroin which was found in the car they had been driving, even though they had denied ownership of the bag when approached and questioned by police in People v. Cameron (1973) 73 Misc.2d 790, 342

> NYS2d 773, where the court pointed out that the accused had not denied possession of the bag and ruled that mere denial of ownership was not proof of an intent to abandon. The bag had not been thrown from the car, the court observed, but had remained under the seat while the accused were stopped and questioned by the police. There is a great deal of difference, the court stated, between denial of ownership of property on a public street where no possession is claimed or indicated and denial of ownership of property in a car where possession is conceded.

40 ALR 4th *Search and Seizure--Abandoned Property* § 22 In Vehicle at 434-35.

B--Under a Factual Analysis Pierce Had No Intent To Relinquish His Expectation of Privacy

"Abandonment is primarily a factual question of intent to voluntarily relinquish a reasonable expectation of privacy, which may be inferred from 'words spoken, acts done, and other objective facts'." Rowe, 806 P.2d at 736 (citation omitted). "Abandonment 'is measured from the vantage point' of the defendant, not the police. 'It is only the [defendant's] state of mind that counts.'" 806 P.2d at 736 (citation omitted). "We determine whether defendants have an expectation of privacy from their point of view. . . . [W]e look to how defendants manifest their expectations regarding the object searched to determine their subjective privacy interest." State v. Kolster, 869 P.2d 993 (Utah App. 1994).

The words used by both Pierce and Eldredge show no intent to abandon or understanding of abandonment of Pierce's expectation of privacy in the trunk contents. The officer acknowledged he questioned Pierce specifically about the contents of the back seat (T. 8, 23). Objectively a reasonable individual questioned about the back seat would answer about the back seat only as Pierce answered. Looking at the "words spoken", Pierce did not say "the only thing in the entire car that is mine is the backpack" or "the only thing in the car that is mine is the backpack", rather referring to the contents of back seat he said "those are the owner's, only thing that is mine is the backpack" (T. 8).

Also at the scene before the packages of marijuana were opened, Pierce admitted the bags contained marijuana and soon thereafter admitted it belonged to him (T. 17). Pierce's actions are inconsistent with an intent to abandon.

It is important to note Eldredge did not treat the backpack statement as an abandonment of any privacy interest in the rest of the vehicle. "What an officer knew or believed is part of our legitimate expectation of privacy analysis only when a defendant has asserted to that officer a permissive or possessory interest in the object searched." Kolster, 869 P.2d 993, 995. That standard is applicable in the present situation. After the backpack comment, Eldredge questioned Pierce further about the

vehicle's contents and requested consent to search the vehicle (T. 12-15). As the vehicle was owned by another individual, if officer felt Pierce had no other items in the vehicle then, he should have tried to contact the owner to obtain permission to search. Obviously, a person who has abandoned any interest in the vehicle and its contents is not the appropriate person to ask to consent to a search, in fact abandoned property does not require consent to search.

Based on Eldredge's request for consent he obviously did not treat the backpack comment as an abandonment of Pierce's further interest in the vehicle and its contents. Eldredge acted as if Pierce had privacy interest. An officer's similar reaction has been held to defeat a claim of abandonment:

> [G]arment bag illegally seized from defendant's railroad sleeping car was not abandoned, even though defendant, when questioned by federal agents as to ownership, replied "Well, it's yours now," where agents gave defendant receipt for it, and waited for dog sniff to establish probable cause instead of treating it as abandoned property and opening it right away. United States v. Dimick (1992, DC Colo) 790 F.Supp. 1543.

40 ALR 4th, *Search and Seizure--Abandoned Property*, § 22.5 Conveyances other than cars or trucks, supp. at 36.

That the "abandonment" in the case at bar was not based on the requisite clear, unequivocal decisive evidence

was acknowledged by the trial court when asked by defense counsel about factual issues that indicated there was no abandonment.

> Miss Starley: On the standing issue, the officer testified that he questioned him about what was in the back seat, and that's when he made the statement that only the backpack was his, and that when he was asked about the marijuana, he did say that was his. That was what was presented to the officer at that time.
>
> The Court: I'm aware of that, Miss Starley, and I realize that that may undercut the conclusion that I arrived at here. But, I'm basing my conclusion on the fact that this is a situation where the defendant, from the very beginning, distanced himself from this vehicle as having any responsibility for what was in it. And, with regard to the only things that were apparent in it, he said, "the only thing that is mine is the backpack." Now, I realize that could have been interpreted as meaning the only thing that's in the back seat is my backpack. But, I find that what the defendant intended to convey was the only things in the car that's mine is the backpack, and everything else in the car is the owner's. And, I agree that there's some ambiguity there in regard to what's in the trunk, because that was not specifically visible. But, I find specifically that the defendant did say, "The only thing that's mine is the backpack." He didn't say, "The only thing in the back seat that's mine is the backpack." He said, "The only thing that's mine is the backpack", meaning and understood to be the only thing in the car.

(T. 72-73).

The trial court's conclusion that Pierce had distanced himself from the vehicle is not supported by the objective facts: he showed Eldredge proof that he was the lawful possessor, answered questions about its contents, signed a consent to search and claimed the marijuana found therein. Given his possession through a drive-away agreement he had many opportunities to distance himself but he did not do so. Again, he could have said "that backpack is only thing in this car that's mine" or "I don't know about anything in the car except my backpack" or when questioned about consent "Don't ask me, nothing in the car is mine". Also as noted above, the trial court's ruling that Eldredge understood Pierce to have abandoned his privacy interest is not supported by the objective facts, in particular, Eldredge did not treat the property as abandoned, instead he asked for consent and even told Pierce that he could not search unless Pierce signed the consent form (T. 12-15).

Obviously Pierce's statement about the back seat contents is nothing like the standard abandonment situation where item is physically discarded, see *Marshall* discussion *supra*, and *Austin* discussion *infra*. "One of the most common situations in which abandonment is claimed by the prosecution, and often sustained by the courts, is where an accused criminal had allegedly dropped, thrown away, or otherwise discarded some incriminating item, such as

narcotics, during an encounter with the police or other law enforcement agents." 40 ALR 4th, *Search and Seizure--Abandoned Property*, § 2 Summary and Comment at 389.

In State v. Austin, Utah Supreme court held that Austin lost his expectation of privacy in items found partially burned in a wastebasket as items were in plain view and

> a privacy expectation is based on a subjective intent that the person has an interest in the property. Once that property is thrown away, however, no valid interest remains. A wastebasket carries an inference that anything put into it is intended to be discarded or destroyed. It is not the same privacy interest that exists in a drawer or in a footlocker as was found in the *Chadwick* case."

Austin, 584 P.2d 853, 857 (Utah 1978). *Chadwick* dealt with warrantless searches during arrests and "held that evidence should be suppressed because it was taken from a footlocker in which the defendant had a privacy interest". 584 P.2d at 855, citing U.S. v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The present case involves a closed container, whose contents were hidden from view, in the trunk of car, an area where Pierce had and kept a privacy interest, like the footlocker in *Chadwick* rather than the wastebasket in *Austin*. The lawful possessor of vehicle has an expectation of privacy in all closed containers in the vehicle which is recognized as reasonable by society, be it a paperbag as

in *Huether*, garbage bag in *Isom*, footlocker in *Chadwick* or a bag in *Cameron*. Pierce maintained his expectation of privacy as did defendants in those cases. Here as in *Cameron*, the bag stayed in the car, concealed from view while defendant was stopped and questioned. It is important to note: "[t]here is a great deal of difference, between denial of ownership of property on a public street where no possession is claimed or indicated and denial of ownership of property in a car where possession is conceded. 40 ALR 4th, *Search and Seizure--Abandoned Property*, § 22 In Vehicle at 434-35 citing *Cameron*.

C--The State Failed to Prove Abandonment

"The burden of proving abandonment falls on the state, and must be shown by 'clear, unequivocal and decisive evidence'." Rowe, 806 P.2d at 736 (citations omitted). The state has not met their burden as they are relying solely on an ambiguous, equivocal statement as the trial court acknowledged *supra*. A statement about one area and one item not the entire vehicle contents. A statement made in a context which showed an intent to maintain an expectation of privacy.

In reviewing all available legal sources, there were no cases found where a statement claiming ownership of one item in a vehicle was held to be a disclaimer of interest in the rest of the vehicle and its contents. However given the number of cases where a direct denial of ownership in

the specific container in question or area enclosing the container has been held to not establish abandonment, it is difficult to see how Pierce's statement could do so.

As seen from the examination of the relevant case law, it takes a very unambiguous disclaimer to support a claim of abandonment: Marshall's initial statement that the suitcases had clothes and his subsequent statements that the cases were not his and must have already been in vehicle were categorized an "ambiguous disclaimer of ownership". 132 Utah Adv. Rep. 45, 50. Rowe's statement that she had removed everything from the room and her leaving her purse in the house with police was held to be insufficient to meet state's burden of proof to establish abandonment. 806 P.2d 730,736-37. Huether's disclaimer of ownership of bag in car was held insufficient as was Isom's denial of ownership of car where contraband was found. 641 P.2d 417, 422-23.

As noted *supra*, an objective analysis of the facts involved shows that abandonment was not intended by Pierce's comment and was not treated as abandonment by Eldredge. Pierce's statement is not sufficient to show an intent to abandon the expectation of privacy in the vehicle and its contents he had as the lawful possessor of the vehicle.

Pierce was only answering the question asked which referred to the contents of the back seat (T. 7-8). Officer acknowledged the question was in reference to

contents of the back seat (T. 8, 23). There is no showing that he intended to disclaim ownership of the rest of the contents of the vehicle. After the backpack statement,the officer asked Pierce to consent to a search and he signed a consent form (T. 12-15). Even using the trial court's flawed analysis of the officer's state of mind at the scene, Eldredge treated Pierce as having a privacy interest by requesting consent and not treating the rest of the vehicle and contents as abandoned or belonging to another. He even told Pierce hat he could not search without Pierce's consent (T. 12-15).

More importantly, Pierce continued to express a privacy interest by signing the form and while he did not claim knowledge of contraband in general when first asked (a mere disclaimer to avoid self-incrimination) he did not say none of its mine or you'll have to contact the owner. Again, he also claimed ownership of the marijuana at the scene, as opposed to the usual situation where the suspect denies any knowledge at the scene and only claims ownership to prove standing at the suppression hearing.

Under the proper abandonment analysis, there is no showing that Pierce intended to abandon his expectation of privacy in the trunk contents. The state has failed to meet its burden of proof.

D. Abandonment is Reviewed Under Correctness Standard.

Judge's Anderson legal conclusion that Pierce abandoned his expectation of privacy is reviewed "under a 'correctness' standard." State v. Sepulveda, 842 P.2d 913, 914 (Utah App. 1992), citing State v. Lopez, 831 P.2d 1040, 1043 (Utah App. 1992). Standing is reviewed under a correctness standard. As noted in *Sepulveda*, "we review the trial court's conclusion as to whether defendant had a legitimate expectation of privacy under a correctness standard, affording no deference." 842 P.2d at 914.

"Utah case law teaches that 'correctness' means 'the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law.' Thus, the broadest scope of judicial review extends to questions of law." Judge Norman H. Jackson, *Utah Standards of Appellate Review*, Utah Bar Journal, October 1994, at 21, quoting State v. Pena, 869 P.2d 932, 936 (Utah 1994) and State v. Deli, 861 P.2d 431, 433 (Utah 1993).

Under the correctness standard the denial of Pierce's motion to suppress should be reversed. From the analysis of the relevant case law and legal authorities, it is clear under the property abandonment inquiry that Pierce did not abandon his expectation of privacy in the vehicle and its contents, specifically in the marijuana in a duffel bag in the trunk. Looking at the objective facts, words spoken,

acts done and Pierce's intent, there is not sufficient support for the abandonment conclusion.

CONCLUSION

Pierce as the lawful possessor had legitimate expectation of privacy in the vehicle and its contents which he maintained throughout his illegal detention and therefore the evidence improperly seized should have been suppressed.

For the reasons stated above, the order denying the motion to suppress should be reversed and the case remanded for dismissal of charges.

Respectfully submitted this 30th day of April, 1995.

Sandra Starley
Sandra V. Starley
Attorney for Defendant

CERTIFICATE OF DELIVERY

I do hereby certify that on the 1st day of May, 1995, I mailed postage prepaid two true and accurate copies of the the foregoing brief of appellant to:

Utah Attorney General
Appellate Division
236 State Capitol Building
Salt Lake City, Utah 84114

Sandra Starley
Attorney for Defendant

Utah Code Annotated, Section 41-6-46. Speed Regulations--Safe and Appropriate Speeds at Certain Locations--Prima Facie Speed Limits--Emergency Power of Governor.

(2) If no special hazard exists, and subject to Subsection (4) and Sections 41-6-47 and 41-6-48, the following speeds are lawful:

(d) 55 miles per hour in other locations.

(3) Except as provided in Section 41-6-48.5, any speed in excess of the limits provided in Subsection (2) is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

Utah Code Annotated, Section 58-37-8(2)(a)(i)

(2) Prohibited acts B -- Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order . . . or as otherwise authorized by this subsection.

Utah Code Annotated, Section 59-19-103

(1) A tax is imposed on marihuana and controlled substances as defined under this chapter at the following rates:

(a) on each gram of marihuana, or each portion of a gram, $3.50.

Utah Code Annotated, Section 77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(g) To the right of appeal in all cases.

Utah Code Annotated, 1953

Court of Appeals jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(f) appeals from a court of record in criminal cases except those involving a conviction of a first degree or capital felony.

Rule 11(i), Utah Rules of Criminal Procedure

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

Rule 26(2)(a), Utah Rules of Criminal Procedure

(2) An appeal may be taken by the defendant from:

(a) the final judgment of conviction, whether by verdict or plea.

Rule 3. Utah Rules of Appellate Procedure

Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

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estion of fact subject to Rule 52(a), N D R Civ P *National Bank of Harvey v International Harvester Co supra, Graber v Engstrom*, 384 N W 2d 307 (N D 1986) A finding of fact is clearly erroneous when, although there is some evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake was made *Id.*

[4] In this case the trial court heard conflicting evidence on the intent of the parties and resolved that conflict in favor of Heupel and against Schuch the party who prepared the agreement. Section 9-07-19, N D C C, *Graber v Engstrom, supra*. We are not left with a definite and firm conviction that the trial court made a mistake in resolving the conflicting evidence Accordingly, we conclude that the trial court's findings of fact are not clearly erroneous

The judgment is affirmed

ERICKSTAD, C.J., and LEVINE, MESCHKE and GIERKE, JJ., concur

STATE of North Dakota, Plaintiff and Appellant,

v.

David L. HUETHER, Defendant and Appellee

Cr. No. 890261.

Supreme Court of North Dakota

March 27, 1990

State appealed from order of the District Court, Grant County, South Central Judicial District, Gerald G Glaser J suppressing evidence obtained in warrantless search of defendant's pickup truck The Supreme Court, Levine J., held that (1) defendant did not abandon paper bag containing controlled substance, (2) police officer who received defendant's consent to search defendant's vehicle for open alcoholic beverage containers exceeded scope of consent when he opened brown paper bag that was partly under front seat of vehicle, and (3) officer did not have probable cause to believe that paper bag contained alcoholic beverage container

Affirmed

1. Criminal Law ⇐1158(4)

Trial court's disposition on motion to suppress will not be reversed if, after conflicts in testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting trial court's determination

2. Drugs and Narcotics ⇐185.10

Defendant who consented to police officer's search of his vehicle for open alcoholic beverage containers did not abandon paper bag containing controlled substance when he told officer that "the bag wasn't his and he didn't know what was inside of it," where statement was made after contraband was uncovered U S C A Const. Amend 4

3. Searches and Seizures ⇐28

Warrantless search or seizure of property that has been abandoned does not violate Fourth Amendment. U S C A. Const. Amend 4.

4. Searches and Seizures ⇐28

"Abandonment," in Fourth Amendment sense, is primarily question of intent which may be inferred from words, acts or other objective facts, abandonment implies renunciation of any reasonable expectation of privacy and is question of fact. U.S. C A Const. Amend 4

See publication Words and Phrases for other judicial constructions and definitions.

5 Searches and Seizures ⇐28

If person alleged to have abandoned property intends to retain his or her privacy interests in that property, there has been no abandonment. U S C A Const. Amend 4

6. Criminal Law ⇐1158(1)

Because resolution of whether place or object has been abandoned depends upon factual inquiry ultimate determination is reviewed under clearly erroneous standard U S C A Const Amend 4

7 Searches and Seizures ⇐65

There is no constitutional distinction between paper bags and other kinds of containers found in vehicle U S C A Const Amend 4

8 Searches and Seizures ⇐28

Where disclaimer of ownership comes only after search of disclaimed article reveals contraband disclaimer, made in effort to avoid making incriminating statement should not alone be deemed to constitute abandonment. U S C A Const.Amend 4

9. Searches and Seizures ⇐201

Question of whether search exceeds scope of consent is factual one, and thus subject to clearly erroneous standard of review U S C A Const.Amend 4

10 Searches and Seizures ⇐171, 186

Consent search is exception to both warrant and probable cause requirements of Fourth Amendment, and must be conducted according to limitations placed upon police officer's right to search by consent or search loses its validity U S C A Const Amend 4

11. Searches and Seizures ⇐186

Police officer who received defendant's consent to search defendant's vehicle for open alcoholic beverage containers exceeded scope of consent when he opened brown paper bag that was partly under front seat of vehicle, where bag had neither weight nor shape of alcoholic beverage container U S C A Const Amend 4

12. Automobiles ⇐349.5(5)

Police officer who conducted search of defendant's vehicle for open alcoholic beverage containers did not have probable cause to believe that paper bag that was partially under front seat contained such a container bag was pushed partly under front seat in such manner as to give officer

no reason to believe it contained a bottle or can U S C A Const Amend 4

13 Criminal Law ⇐1158(4)

Trial court at suppression hearing is in superior position to judge credibility of witnesses and weight to be accorded their testimony, conflicts in testimony must be resolved in favor of affirming trial court

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Phyllis Ann Ratcliffe State's Atty , Carson, for plaintiff and appellant

Vinje Law Firm Bismarck, for defendant and appellee argued by Ralph A Vinje

LEVINE Justice

The State appeals from an order suppressing evidence obtained in a warrantless search of David Huether's pickup truck We affirm

Rick Michels a state highway patrol officer, stopped Huether for speeding Michels detected the odor of alcohol on Huether's breath and asked if he had been drinking Huether admitted to drinking and volunteered that there was an unopened six-pack of beer in his truck Michels suspected an open container and obtained Huether's consent to search the truck for open containers

The officer opened the driver's door to Huether's truck and saw on the floor by the passenger seat a paper sack containing what he believed to be a six pack of beer However, he did not open this bag Instead he directed his attention to a small paper bag pushed partly under the front seat Huether told the officer that bag contained only garbage

The officer pulled the bag from under the seat and opened it. It contained thirty three packets later determined to contain amphetamine hydrochloride, a controlled substance Huether denied both ownership of the bag and knowledge of its contents He was then arrested and charged with possession with intent to deliver a controlled substance in violation of NDCC § 19-03 1-23(1)(b)

Huether moved to suppress the evidence of controlled substance The district court granted the motion to suppress, finding that the search of the paper bag exceeded the scope of Huether's consent, was not supported by probable cause and that Huether had a reasonable expectation of privacy in the vehicle The State appealed, challenging these determinations

[1] The trial court's disposition on a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance there is sufficient competent evidence fairly capable of supporting the trial court's determination *State v Lorenzen*, 401 N W 2d 508, 508 (N D 1987) With that standard in mind, we consider the State's arguments for reversal

[2] The State first argues that Huether does not have "standing" [1] to contest the search of the paper bag because he abandoned the paper bag and therefore relinquished any legitimate expectation of privacy in it. The State does not dispute Huether's ownership, occupation or control of the vehicle in which the paper bag was found, his possession of the paper bag at the time of the search or his control over it. Instead the State argues that when Huether stated to the police officer, after the contraband was uncovered, that "the bag wasn't his and he didn t know what was inside of it" he lost any expectation of privacy in the bag

[3-6] A warrantless search or seizure of property that has been abandoned does not violate the fourth amendment *United States v Thomas*, 864 F 2d 843 (D C Cir 1989) Abandonment, in the fourth amendment sense is primarily a question of intent which may be inferred from words acts and other objective facts *United States v Burnette*, 698 F 2d 1038 (9th Cir) *cert. denied*, 461 U S 936 103 S Ct 2106 77 L.Ed 2d 312 (1983) Abandonment implies a renunciation of any reasonable expectation of privacy and is a question of fact *United States v Alden* 576 F 2d 772 (8th Cir) *cert denied*, 439 U S 855 99 S Ct 167 58 L Ed 2d 161 (1978) If the person alleged to have abandoned property intends to retain his or her privacy interest in that property, there has been no abandonment *United States v Burnette supra*. Because resolution of whether a place or object has been abandoned depends upon a factual inquiry, the ultimate determination is reviewed under a clearly erroneous standard *United States v Thomas supra*

The State points to Huether s denial of ownership as conclusive evidence of abandonment. However, the trial court apparently determined that Huether's disavowal of ownership of the paper bag standing alone was not a renunciation of Huether s reasonable expectation of privacy in the bag

While a disclaimer of ownership or knowledge may well be evidence that a defendant does not reasonably expect the article to be free from intrusion *State v Benjamin* 417 N W 2d 838 (N D 1988) such disclaimer is "not necessarily the hall mark for deciding the substance of a fourth amendment claim" *United States v Haukins* 681 F 2d 1343, 1346 (11th Cir) *cert denied*, 459 U S 994, 103 S Ct 354 74 L.Ed 2d 391 (1982) As we said in *State v Benjamin* "[W]hile property ownership is a consideration, it neither begins nor ends the inquiry 417 N W 2d at 840 *But cf State v Klodt* 298 N W 2d 783 (N D 1980) [upholding search on basis of plain view but conferring 'threshold standing' based either on ownership or legitimate expectation of privacy in vehicle or both] In the same way that ownership alone may not be sufficient to confer or retain a reasonable expectation of privacy *e g Benjamin, Thomas supra* disavowal of ownership alone may not be enough to relinquish one s reasonable expectation of privacy *See Hawkins supra, Commonwealth v Holloway* 9 Va App 11 384 S E 2d 99 (1989) This is especially true where, as here the paper bag is contained and controlled within an area where there is a legitimate expectation of privacy *See People v Cameron* 73 Misc 2d 790, 342 N Y S 2d 773 (Sup Ct 1973) Huether did not discard or place the bag in a public place *Cf City of St Paul v Vaughn* 306 Minn 337 237 N W 2d 365 (1975) [defendant who tucked eyeglass case under a counter at business establishment had no reasonable continued expectancy of privacy in the discarded property]

[7, 8] There is little doubt that Huether had an expectation of privacy in his vehicle and in every container therein that concealed its contents from plain view *United States v Ross* 456 U S 798, 823, 102 S Ct 2157 2172 72 L Ed 2d 572 (1982) There is no constitutional distinction between paper bags and other kinds of containers *Id* Furthermore where the disclaimer comes only after the search of the disclaimed article reveals contraband the disclaimer made in an effort to avoid making an incriminating statement, should not alone be deemed to constitute abandonment [2] *State v Isom*, 196 Mont 330, 641

1 Although "standing" in its traditional form is no longer part of fourth amendment analysis the term continues to be used as convenient shorthand for the concept of "legitimate expectation of privacy" *See Rakas v Illinois* 439 U.S 128 139 99 S Ct 421 428 58 L.Ed 2d 387 (1978) In *Rakas* the Supreme Court "discarded reliance on concepts of standing in determining whether a defendant is entitled to claim the protections of the exclusionary rule The inquiry after *Rakas* is simply whether the defendant s rights were violated by the allegedly illegal search or seizure" *United States v Salvucci*, 448 U.S 83 87 n 4 100 S Ct 2547 2551 n 4 65 L Ed 2d 619 (1980)

2. The State relies heavily on *United States v Veatch* 674 F 2d 1217 (9th Cir 1981) to support its contention that the evidence seized should not have been suppressed Veatch was a passenger in a vehicle occupied by two other persons The vehicle was stopped and the officer noting a gun and wallet in plain view in the back seat where Veatch had been sitting asked Veatch if the wallet were his and if he wanted to take it with him Veatch denied ownership of the wallet The Court of Appeals affirmed the trial court s finding that Veatch abandoned the wallet and any reasonable expectation of privacy in it We believe the primary distinction that renders *Veatch* inapposite is that Veatch was a passenger in a vehicle and thus did not have any reasonable expectation of privacy in the vehicle Further his disclaimer of ownership preceded the search of the wallet The abandonment was therefore complete by the time the officer searched the wallet leaving Veatch with no privacy interest in the wallet at the time of the search The same court which decided *Veatch*

P 2d 417 (1982), *State v Machlah*, 505 N E 2d 873 (Ind Ct App 1987), 4 W La-Fave, *Search and Seizure* § 11 3(f) at 343 Under the circumstances, we find no error in the district court's underlying determination that Huether had an expectation of privacy in the bag thereby retaining the protection of the fourth amendment

[9] The State next argues that the search of the paper bag was within the scope of Huether's consent The question whether a search exceeds the scope of consent is a factual one, *United States v Mines*, 883 F 2d 801, 803 (9th Cir), *cert. denied*, — U S —, 110 S Ct 552, 107 L Ed 2d 549 (1989), and thus subject to the clearly erroneous standard of review *See State v Padgett*, 393 N W 2d 754, 757 (N D 1986), *State v Packineau*, 423 N W 2d 148, 151 n 1 (N D 1988)

[10] A consent search is an exception to both the warrant and probable cause requirements of the fourth amendment. *Schneckloth v Bustamonte*, 412 U.S 218, 219, 93 S Ct 2041, 2043, 36 L Ed 2d 854 (1973), *Mines, supra*. *See State v Gronlund*, 356 N W 2d 144 (N D 1984) It must be conducted according to the limitations placed upon an officer's right to search by the consent or the search loses its validity *United States v McBean*, 861 F 2d 1570 (11th Cir 1988)

[11] The trial court found that "There is some difference as to exactly what was said, but there is no dispute that the defendant consented to the search of his vehicle but for the limited purpose of determining whether there was an open receptacle containing an alcoholic beverage" This finding is supported by the officer's testimony

"[DEFENSE COUNSEL] Q I'm going to read from your preliminary hearing just briefly 'I then asked Mr Huether if I could check his vehicle, search—check for open containers, and he said, yes, I could There was nothing open in there' Is that a correct statement of what occurred?

"[OFFICER MICHELS] A I believe so, yes

"Q So, your permission to search was limited to searching for open containers, is that correct?

"A That was my intent, yes"

The trial court found that the search of the paper bag exceeded the scope of Huether's consent because, given the paper bag's appearance and location, it could not reasonably be expected to contain the open container for which the officer was authorized by Huether's consent to search A more likely receptacle, but one into which the officer did not look, was the larger paper sack on the floor by the front passenger seat. In this larger paper sack, the trial court found, the officer could detect "what was apparently a '6-pack'" Yet, as the trial court noted, the officer chose to ignore the obvious and zero in on the much smaller bag tucked partly under the front seat. That the smaller bag could not have held a bottle or a can became obvious once the officer pulled it from under the seat. Although this bag had neither the weight nor the shape of an alcoholic beverage container the officer "decided nevertheless to open the sack to see what was in it." This was impermissible under *United States v Ross*, 456 U S 798, 102 S Ct. 2157, 72 L Ed 2d 572 (1982)

Ross involved a warrantless vehicle search conducted pursuant to probable cause rather than consent The Court in *Ross* held that the scope of a search is defined by the object of the search and is thus limited to places in which there is probable cause to believe that it may be found *Id* The rule articulated in *Ross* has also been applied to consent searches *United States v Kapperman*, 764 F 2d 786 (11th Cir 1985), *United States v White*, 706 F 2d 806 (7th Cir 1983) *See* 3 W La-Fave, *Search and Seizure* § 8 1(c) at 165–67 [a description of the objects to be sought in search limits scope of that search]

In essence, the State argues that Huether's authorization to Michels constituted general consent to search his vehicle The trial court found otherwise determining that Michels exceeded the scope of Huether's consent and conducted a general exploratory search We conclude that the trial court's finding was not clearly erroneous

[12] Finally, the State argues that the search was nevertheless valid because the officer had probable cause to believe that the bag might contain the open container This argument fails for the same reason the consent argument fails the district court found that the bag could not reasonably be expected to conceal an open container *Ross, supra*, 456 U S at 824, 102 S Ct at 2172 *See State v Schinzing*, 342 N W 2d 105, 109–110 (Minn 1983) [suggesting officer could not reasonably believe that an open container could be in an ashtray]

The district court found that the "paper sack [was] pushed partly under the front seat in such a manner as to give the officer no reason to believe it contained a bottle or can " The State disputes this finding, arguing, "It is not unreasonable for the officer to believe that a can could have been quickly crushed, stuffed in the sack and hurriedly attempted, albeit unsuccessfully, to be jammed under the seat" While there is testimony to that effect, there is also contrary testimony which supports the district court's finding

[13] The trial court is in a superior position to judge the credibility of witnesses and the weight to be accorded their testimony *See State v Pickar*, 453 N W 2d 783 (N D 1990) Conflicts in testimony must be resolved in favor of affirming the trial court. *Lorenzen, supra*. In this instance, affirming the trial court means affirming the suppression order We conclude that there is sufficient competent evidence supporting the trial court's order and, accordingly, we affirm

ERICKSTAD, C J , and VANDEWALL, MESCHKE and GIERKE, JJ , concur

STATE of North Dakota, Plaintiff and Appellant,

v.

Ross PICKAR, Defendant and Appellee.

Cr. No. 890270.

Supreme Court of North Dakota

March 27, 1990

In prosecution for two counts of manslaughter stemming from a single-vehicle roll-over accident in which two of defendant's friends were killed, defendant moved to suppress his confession The District Court, Griggs County, Northeast Central Judicial District, Bruce E Bohlman, J , granted defendant's motion upon determining that the confession was involuntary The State appealed The Supreme Court, Levine, J , held that the trial court's findings with respect to the accused's physical and mental condition and prior experience with the police as well as with respect to the coerciveness of the police conduct during the interrogation, including the interrogation techniques used by the police such as playing on the accused's guilt and sense of duty to the family of his deceased friends as well as offering the accused an implied inducement of no prosecution in the event of his confession, were not contrary to the manifest weight of the evidence and supported the trial court's determination of involuntariness

Affirmed

recognized in *United States v Burnette*, 698 F 2d 1038 1048 n. 19 (9th Cir) *cert denied*, 461 U S 936 103 S Ct 2106 77 L Ed 2d 312 (1983) that a mere disclaimer is usually not enough to constitute abandonment. Generally abandonment is found only where the disclaimer is coupled with a physical relinquishment of the property *See United States v Kendall* 655 F 2d 199 (9th Cir) *cert denied*, 455 U S 941, 102 S Ct 1434 71 L Ed 2d 652 (1981) *United States v Jackson*, 544 F 2d 407 (9th Cir 1976)

there was silent concerning the
› between the decedent and his
d it appears the verdict included
0 for nonpecuniary damages.
amount to be awarded for nonpe-
nages is a question for the jury.
before us, there was no award
parents for their nonpecuniary
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the medical and burial expenses,
ı would be a more difficult one.

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The question arises whether
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adequate damages were awarded as a compromise on the issues of liability and damages. *Corman, Administrator v. WEG Dial Telephone, Inc.*, 194 Kan. 783, 402 P.2d 112; *Timmerman v. Schroeder*, 203 Kan. 397, 401–02, 454 P.2d 522 (1969). In fairness to the trial judge here, we note that plaintiffs did not file a motion for a new trial; thus, the trial judge had no opportunity to rule on the adequacy of the verdict. Such a motion is not necessary, however, for us to consider the issue on appeal. *Atkinson v. Orkin Exterminating Co.*, 5 Kan.App.2d 739, 625 P.2d 505, *aff'd on review*, 230 Kan. 277, 634 P.2d 1071 (1981). The jury in this case was instructed to fix damages without considering the percentage of fault of the parties. In view of the instruction on comparative fault, of the instruction not to consider the percentage of fault in fixing damages, and of the jury's finding of fault within a range which we feel is supported by the record, we are unable to say the inadequate damages were awarded as a compromise on the issue of liability.

Reversed and remanded with directions to grant a new trial on the issue of damages only.

STATE of Montana, Plaintiff and Respondent,

v.

Howard Michael ISOM, Defendant and Appellant.

No. 81–18.

Supreme Court of Montana.

Submitted Sept. 17, 1981.

Decided Jan. 21, 1982.

Rehearing Denied March 15, 1982.

Defendant was convicted in the District Court of the First Judicial District, in and for the County of Lewis and Clark, Peter Meloy, J., of felony possession of dangerous drugs, and he appealed. The Supreme Court, Daly, J., held that: (1) defendant had standing to contest legality of search of residence where he was overnight guest; (2) defendant had standing to contest search of his car and garbage bags found in its trunk even though he denied ownership of car at time of search; and (3) district court erred in determining there was probable cause for search warrant and, thus, searches of house and car were in violation of Fourth Amendment and evidence resulting from searches was not admissible against defendant.

Reversed and cause dismissed.

Haswell, C. J., and Sheehy, J., concurred in result.

Weber, J., dissented with opinion.

1. Searches and Seizures ⇐7(26)

Test for standing to challenge legality of search is not to be based on distinctions out of property and tort law and, rather, legitimate expectation of privacy makes it clear that capacity to claim protection of the Fourth Amendment depends not upon property right in invaded place, but upon whether area was one in which there was reasonable expectation of freedom from government intrusion. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(26)

Fact that defendant was overnight guest in residence searched would not control determination of his standing to contest legality of search of residence. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(26)

Where confiscated evidence was found in areas where defendant slept and where he stored his belongings and defendant was sole occupant of residence at time of search and had control and dominion over it to exclusion of others, defendant did have standing to contest search of premises in which he was overnight guest. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐7(27)

Search and seizure disclaimer statute must be interpreted in light of Fifth Amendment privilege against self-incrimination. MCA 46–5–103(1); U.S.C.A.Const. Amend. 5.

5. Searches and Seizures ⇐7(27)

Disclaimer of car does not necessarily operate as disclaimer of closed containers in car for purposes of search and seizure disclaimer statute. MCA 46–5–103(1).

6. Searches and Seizures ⇐7(26)

Although it has been held that owner of car or container will lose his standing to object to search of it if he abandons it prior to time of search, mere disclaimer of ownership in effort to avoid making incriminating statement in response to police questioning should not alone be deemed to constitute abandonment. MCA 46–5–103(1).

7. Searches and Seizures ⇐7(26)

The *Miranda* limitations should apply to disclaimers when State uses them to deprive a person of Fourth Amendment standing. MCA 46–5–103(1); U.S.C.A. Const.Amends. 4, 5.

8. Searches and Seizures ⇐7(26)

Where disclaimer was elicited from defendant by direct police questioning after defendant was told to sit on couch and not leave, State could not be allowed to use

defendant's disclaimer statements to deprive defendant of his standing to contest search of his car and search of garbage bags in its trunk. MCA 46–5–103(1); U.S.C.A.Const.Amends. 4, 5.

9. Searches and Seizures ⇐7(26)

Even assuming that defendant's disclaimer of ownership of car could be construed to deprive defendant of standing to contest search of car, disclaimer could not be construed to deprive defendant of standing to contest search of garbage bags found in trunk of car. MCA 46–5–103(1); U.S.C.A.Const.Amends. 4, 5.

10. Searches and Seizures ⇐3.6(2)

When a search warrant has been issued, determination of probable cause must be made solely from information given to impartial magistrate and from four corners of search warrant application. U.S.C.A.Const.Amend. 4.

11. Drugs and Narcotics ⇐188

Where district court, in determining probable cause to issue search warrant, considered not only four corners of search warrant application but looked to evidence that one of parties involved was known drug dealer and evidence of informant's tip, district court's determination of probable cause was error and would be vacated. U.S.C.A.Const.Amend. 4.

12. Drugs and Narcotics ⇐188

Where there was nothing in record showing some of underlying circumstances from which informant concluded that narcotics were where he claimed they were and there was nothing in record showing underlying circumstances from which officer concluded that informant was credible or his information was reliable, district court erroneously relied upon information received from informant in determining whether there was probable cause to issue search warrant. U.S.C.A.Const.Amend. 4.

13. Searches and Seizures ⇐3.6(2)

Probable cause to issue search warrant exists when facts and circumstances presented to magistrate would warrant an honest belief in mind of reasonable and prudent man that offense has been, or is being, committed and that property sought exists at place designated; in other words, search warrant application must recite underlying facts and circumstances from which magistrate can determine validity of affiant's conclusion that certain evidence exists at a particular premises. U.S.C.A.Const.Amend. 4.

14. Searches and Seizures ⇐3.6(2)

Mere taking of opaque green garbage bag out of residence and finding of similar green garbage bag in alley near spot where deputies lost sight of party they were following did not establish probable cause for search of residence. U.S.C.A.Const.Amend. 4.

15. Drugs and Narcotics ⇐188

Fact that affiant believed that vehicle was used to convey marijuana and other dangerous drugs to residence described was not sufficient to establish probable cause to search car parked in front of residence. U.S.C.A.Const.Amend. 4.

16. Searches and Seizures ⇐3.6(2)

Mere affirmation of belief or suspicion by police officer, absent any underlying facts or circumstances, does not establish probable cause for issuance of search warrant. U.S.C.A.Const.Amend. 4.

Leo Gallagher argued, Helena, for defendant and appellant.

Mike Greely, Atty. Gen., John Maynard, Asst. Atty. Gen., argued, Charles Graveley, County Atty., Steve Garrison, Deputy County Atty., argued, Helena, for plaintiff and respondent.

DALY, Justice.

Defendant was charged by information with possession of dangerous drugs with intent to sell, as provided in section 45–9–103(1), MCA. He pleaded not guilty. His motion to suppress was denied by the District Court of the First Judicial District, Lewis and Clark County. After a jury trial defendant was found guilty of felony possession of dangerous drugs, a lesser included offense of possession with intent to sell. On October 15, 1980, the defendant was sentenced to five years in the Montana State Prison, with two years suspended. Defendant appeals his conviction.

Based on information from an informant, the Lewis and Clark County Sheriff's Department placed under surveillance the residence located at 1014 Elm Street, Helena, Montana. About noon on January 11, 1980, two deputy sheriffs observed a man later identified as John Stemple, a suspected drug dealer, leave the Elm Street residence. He was carrying a large green garbage bag which he put into a tool box in the back of his pickup truck parked in front of the residence.

Stemple went back into the residence. A brown Ford station wagon pulled up. A man later identified as the defendant got out of the station wagon and went into the residence. Stemple then left the residence and drove away in his pickup, followed by the two deputies in an unmarked car.

According to the deputies, Stemple made evasive maneuvers by turning several corners sharply. They lost sight of Stemple and called for the aid of a third officer. The third officer stopped Stemple within a matter of minutes.

The officers searched Stemple's truck but could not find the green garbage bag that Stemple had placed in the tool box. Because of a recent snowfall the officers were able to retrace the tracks of the pickup. The tracks led to an alley behind a gas station where they found a large green garbage bag which apparently had been placed there recently since it was not covered with snow. The deputies looked inside the bag and found it full of marijuana contained in small plastic bags.

An officer went to get a search warrant for the Elm Street residence and for a maroon Chrysler Cordoba parked in front of the residence which the officers believed had been used to transport narcotics. A search warrant for both the residence and the car was issued by a justice of the peace. The warrant application contained the above information, except there was mention of the surveillance being based an informant's tip and no mention th John Stemple was a suspected drug deal

At least eight officers and the coun attorney executed the search warra When the officers arrived at the Elm Str residence, they noticed that the motor w running on the Chrysler. A couple of of cers stayed with the car, while the oth went to search the residence. Defenda answered the door of the residence. T officers handed him the search warrant they entered. Defendant was only weari a pair of blue jeans. He testified that was half-dressed because he was getti ready to take a shower. Defendant w ordered to sit on the couch and not to lea the room.

Defendant was the only occupant of t residence when the officers entered. was a guest of his uncle who rented t residence. He had been sleeping on t couch in the living room and had stored belongings in the living room and in a b room.

The officers searched the entire hou finding marijuana residue and drug pa phernalia in nearly every room, includi the living room, bathroom and kitchen. small plastic bag of marijuana was found the bedroom of defendant's uncle.

One uniformed officer was told to s with defendant and watch him while others completed the search. He asked fendant if he owned the car parked in fr of the residence. Defendant said he did own the car. In response to further qu tioning, defendant said he did not kn who did own the car and did not kn where the keys to the car's trunk w located. Defendant was not arrested pr to these questions and had not been give *Miranda* warning.

The officers searched the car. U finding the glove compartment and trunk locked, they forced the glove co partment open, and inside it they foun key to open the trunk. Inside the trunk officers found several large green garb

gs which contained approximately eighty ninety pounds of marijuana. After the rch of the residence and the car, defend- was arrested.

.t the suppression hearing, defendant in- luced evidence to show that he owned car in which the marijuana was found.

his case may be resolved by looking at three primary issues presented:

Whether the defendant has standing ontest the legality of the search of the lence where he was an overnight guest;

Whether the defendant has standing ontest the search of his car and the age bags found in its trunk when he ed ownership of the car at the time of earch; and

Whether the District Court erred in enial of defendant's motion to suppress nce seized from the residence and the

th respect to defendant's standing to st the search of the house, the State l have this Court adopt the perspective easoning of the most recent United s Supreme Court decisions which have uled the automatic standing rule of *v. United States* (1960), 362 U.S. 257, Ct. 725, 4 L.Ed.2d 697. See, *United v. Salvucci* (1980), 448 U.S. 83, 100 2547, 65 L.Ed.2d 619, and *Rawlings v. cky* (1980), 448 U.S. 98, 100 S.Ct. 55 L.Ed.2d 633.

es had set down two alternative hold- (1) when the fruits of a search are ed to be used against a defendant at ial, he has "automatic standing" to t the legality of the search; and (2) "legitimately on the premises where ch occurs may challenge its legality y of a motion to suppress". *Jones*, S. at 267, 80 S.Ct. at 734. The pur- the automatic standing rule was to he "vice of prosecutorial self-contra- in which the State could charge a with possession as a crime, and at ne time claim that the possession was ficient to give the person standing to ge the legality of the search or sei- See, *Brown v. United States* (1973), . 223, 93 S.Ct. 1565, 36 L.Ed.2d 208.

In overruling the automatic standing rule in *Jones*, both *Salvucci* and *Rawlings* relied heavily upon the earlier case of *Rakas v. Illinois* (1978), 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387.

In *Rakas*, the Court stated that the *Jones* test of "legitimately on the premises" cannot be taken in its full sweep beyond the facts of that one case. Rather, said the Court, the true test of whether a Fourth Amendment right has been violated is found in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, in which the Supreme Court said that the capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Fourth Amendment *has a legitimate expectation of privacy in the invaded place.* *Katz*, 389 U.S. at 353, 88 S.Ct. at 512; *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430.

[1] Notwithstanding the limitations placed on *Jones*, the Court in *Rakas*, and again in *Salvucci*, emphasized that ownership is not a key element in determining standing. The test for standing is not to be based on distinctions out of property and tort law: "In defining the scope of that interest, we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions in property and tort law between guests, licensees, invitees, and the like ought not to control." See *Jones*, 362 U.S. at 266, 80 S.Ct. at 733; *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430; *Salvucci*, 448 U.S. at 91, 100 S.Ct. at 2553; and *Rawlings*, 448 U.S. at 105, 100 S.Ct. at 2561. The controlling view, then, seems to be that expressed in *Mancusi v. DeForte* (1968), 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154, in which the Court said that the *Katz* test of " 'legitimate expectation of privacy' makes it clear that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon *whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.*" See *Mancusi*, 392 U.S. at 368, 88 S.Ct. at 2124. (Emphasis added.)

Following the rationale that ownership is not the controlling factor in the determination of standing, although it is one factor to consider, the Supreme Court has pointed out that the actual holding in *Jones* was not overruled. In *Rawlings*, the Court referred to parts of *Rakas* which explained why the defendant in *Jones* would still have standing under the recent narrow tests for standing. The Court in *Rakas* reasoned that the defendant in *Jones*, who was using an apartment with the tenant's permission, would continue to have standing under the recent tests because the defendant "had complete dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149, 99 S.Ct. at 433. The Court in *Rakas* also reasoned that the defendant in *Katz*, who was in a phone booth, had standing to contest a search of the booth because he had an expectation of privacy when he "shut the door behind him to exclude all others and paid the toll." *Rakas*, 439 U.S. at 149, 99 S.Ct. at 433.

In *State v. Allen* (1980), Mont., 612 P.2d 199, 37 St.Rep. 919, this Court quoted extensively from *Rakas*, acknowledging the distinctions between *Rakas*, *Jones* and *Katz*. See, *Allen*, 612 P.2d at 201–202.

Here, the District Court made two findings of fact that relate to defendant's standing to contest the search of the residence: (1) that defendant was an overnight guest at the residence which was rented by his uncle; and (2) that defendant had stored clothing, luggage and other personal property in limited areas of the residence, none of which included the areas where the confiscated evidence was found.

Based on the above findings, the District Court concluded as a matter of law that "the defendant, being an overnight guest in the residence with items stored only in a limited area therein, had no reasonable expectation of privacy in the areas where the items were found, therefore, has no standing to object to their admission."

The fact that the defendant was an overnight guest should not control the determination of standing, although it is one factor to consider. As was noted in the above discussion, protection from unreasonable searches and seizures does not depend upon a property right in the invaded place, but rather upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. See, *Allen*, 612 P.2d at 202.

Moreover, although the order of the District Court must be presumed correct upon appeal, *State v. District Court* (1978), 176 Mont. 257, 577 P.2d 849, the record clearly does not support the finding that confiscated evidence was not found in the areas where defendant had stored his personal belongings. Uncontradicted testimony at the suppression hearing showed that defendant slept on the living room couch while he was the guest of his uncle and that he stored his belongings in the living room and in his nephew's bedroom. Although evidence at the suppression hearing showed that his uncle's bedroom was the only area where a small bag of marijuana was seized, it was made clear at the trial that evidence was seized from the living room table, from the living room fireplace, beside a wall in the living room, and from the living room closet.

Defendant was the sole occupant of the house at the time the search was made. Like the defendants in *Jones* and *Katz*, defendant could exclude all others except his uncle and family and had dominion and control over the premises at the time the officers entered the residence.

[2, 3] In summary, the District Court's conclusion that defendant lacked standing to contest the search of the premises must be reversed on the following grounds: (1) the fact that the defendant was an overnight guest should not control a determination of his standing to contest the legality of a search of the residence; (2) the record shows that confiscated evidence was found in areas where the defendant slept and where he stored his belongings; and (3) the record supports a finding that the defendant was the sole occupant of the residence at the time of the search and had control and dominion over it to the exclusion of others.

The State urges this Court that the next issue which must be discussed is whether defendant had standing to contest the search of his car. The State claims that because defendant denied his ownership of the car, he waived his Fourth Amendment rights in it and in the garbage bags found in its trunk.

The State argues that section 46–5–103(1), MCA, deprives the defendant of standing to contest the search of his car and the search of the garbage bags found in its trunk. Section 46–5–103(1), MCA, provides:

"No search and seizure, whether with or without warrant, shall be held illegal as to a defendant if:

"(1) the defendant has disclaimed any right to or interest in the place or object searched or the instruments, articles, or things seized;"

[4, 5] The State's argument fails for two reasons: the disclaimer statute must be interpreted in light of the Fifth Amendment privilege against self-incrimination; and, a disclaimer of a car does not necessarily operate as a disclaimer of the closed containers in the car.

[6] Although it has been held that the owner of a car or a container will lose his standing to object to the search of it if he abandons it prior to the time of the search, *United States v. Anderson* (5th Cir. 1974), 500 F.2d 1311; *United States v. Colbert* (5th Cir. 1973), 474 F.2d 174; and *United States v. Miller* (1st Cir. 1978), 589 F.2d 1117, a mere disclaimer of ownership in an effort to avoid making an incriminating statement in response to police questioning should not alone be deemed to constitute abandonment. See, LaFave, *Search and Seizure*, Vol. 3 at 581. Given the position that a defendant does not otherwise have to incriminate himself to preserve his Fourth Amendment rights, as in *Simmons v. United States* (1968), 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, it is difficult to understand how a refusal to make incriminating admissions in response to police interrogation can be held to deprive a person of Fourth Amendment standing.

To say that there is no Fifth Amendment violation because the defendant could have simply chosen to be silent is to ignore the whole line of principles set down in *Miranda* and its progeny. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

The point of the *Miranda* warning was to provide a safeguard against the coercive pressures of in-custody interrogation by police, when those pressures are so great as to undermine an individual's will, compelling him to speak when he would not otherwise do so. 384 U.S. at 467, 86 S.Ct. at 1624. "Custodial interrogation" was found to be inherently coercive. The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way.*" 384 U.S. at 444, 86 S.Ct. at 1612.

[7] Clearly, the *Miranda* limitations should apply to disclaimers when the State uses them to deprive a person of Fourth Amendment standing.

[8] Here, the totality of the circumstances suggests that the disclaimer resulted from "custodial interrogation." The defendant was told to sit on the couch and not leave. A uniformed officer was ordered to watch the defendant and stay with him while five other officers searched the house. The defendant was not free to walk around the house. The disclaimer was elicited from defendant by direct police questioning. Given this coercive atmosphere and the questioning, the State cannot be allowed to use such statements to deprive defendant of his Fourth Amendment rights.

[9] Notwithstanding the Fifth Amendment limitations on section 46–5–103(1), MCA, and assuming that the disclaimer could be construed to deprive the defendant of standing to contest the search of the car, in light of *Robbins v. California* (1981), 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, the disclaimer could not be construed to deprive the defendant of standing to contest the search of the *garbage bags* found in the trunk of the car.

In *Robbins*, the Court held that while police may have conducted a lawful search of an automobile under the automobile exception, they must nevertheless secure a warrant for any container found in the trunk of the car. The Court recognized that the expectation of privacy in a closed container taken from a car is not necessarily less than the privacy expectation in closed pieces of luggage found elsewhere.

Following a similar reasoning, it cannot be said that the defendant lost his expectation of privacy in the opaque garbage bags when he disclaimed ownership of the car. While it is arguable that the disclaimer weakened the defendant's expectation of privacy in the car, it cannot be said to have affected his expectation of privacy in the garbage bags. The disclaimer, therefore, in no way affected defendant's standing to contest the search of the garbage bags.

[10] The next issue which must be discussed is whether the District Court properly denied defendant's motion to suppress. As many cases in Montana have held, when a search warrant has been issued, the determination of probable cause must be made solely from the information given to the impartial magistrate and from the four corners of the search warrant application. See, Art. II, Sec. 11, 1972 Mont.Const.; *Thomson v. Onstad* (1979), 182 Mont. 119, 594 P.2d 1137, 36 St.Rep. 910; *State v. Olson* (1979), 181 Mont. 323, 589 P.2d 663, 36 St.Rep. 146; *State v. Leistiko* (1978), 176 Mont. 434, 578 P.2d 1161; *State ex rel. Townsend v. District Court* (1975), 168 Mont. 357, 543 P.2d 193; *Application of Gray* (1970), 155 Mont. 510, 473 P.2d 532.

[11] Here the evidence is uncontradicted that the only information given to the justice of the peace was the information contained in the search warrant and the search warrant application. Nevertheless, the District Court, in its order denying the motion to suppress, did not look to the validity of the search warrant and the sufficiency of the information before the neutral magistrate. Rather, the District Court loc whether the *officers* had probable c search the residence and the vehicle in front of the residence. The I Court made the following conclusi law:

"The officer's observation of John ple leaving the duplex with a g bag later found to contain mar *when joined with the with prior edge of his drug sale involvemei the information that the officers ceived regarding the incoming ma shipment*, gave the officers p cause to believe that dangerous d evidence of its possession would be in the premises searched and in th cle searched." Conclusion of Law (Emphasis added.)

"The search of the automobile w justifiable under the automobile tion to the search warrant requir since there was both probable cau exigent circumstances. The fact th dence of dangerous drugs were fo the residence added to and enhanc probable cause had by the officers subsequent *Carroll* search of the a bile." Conclusion of Law No. 4.

From these conclusions of law, it the District Court, in making its dete tion of probable cause for the sear the residence and the car, looked the four corners of the search warr plication and was thereby in error. above conclusions, the District Court to evidence that John Stemple was a drug dealer and evidence of an info tip, neither of which were contained search warrant or the warrant's appl

[12] Moreover, the District Cou liance upon the information receive the informant was error since the nothing in the record to satisfy th pronged test of *Aguilar v. Texas* (19 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 7 *Spinelli v. United States* (1969), 3 410, 89 S.Ct. 584, 21 L.Ed.2d 637. was nothing in the record which "some of the underlying circum from which the informant conclud

narcotics were where he claimed they
," and there was nothing in the record
ring "the underlying circumstances
which the officer concluded that the
mant . . . was 'credible' or his informa-
was 'reliable'." *Aguilar*, 378 U.S. at
84 S.Ct. at 1514. See also, *Leistiko*, 578
at 1163.

e District Court's determination of
able cause must, therefore, be vacated,
a new determination of probable cause
be made by looking to the four cor-
of the search warrant application it-

] It is well established in this state
type of facts must be contained in a
h warrant application:

. . . Affidavits relied upon for the is-
ance of search warrants in both federal
d state prosecutions must contain suffi-
nt facts to enable an impartial commis-
ner or magistrate to determine wheth-
probable cause exists under the Fourth
nendment . . .'" *State ex rel. Garris
Wilson* (1973), 162 Mont. 256, 511 P.2d
17, quoting *Application of Gray*
70), 155 Mont. 510, 473 P.2d 532.

obable cause exists when the facts and
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reasonable and prudent man that the
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*that the property sought exists at the
designated.*" See, *State v. Robinette*
1978), 270 N.W.2d 573, 577. In other
s, the search warrant application must
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om which the magistrate can deter-
the validity of the affiant's conclusion
certain evidence exists at a particular
ises. *Nathanson v. United States*
), 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed.
see also, *Aguilar*, supra; *United States
ntresca* (1965), 380 U.S. 102, 85 S.Ct.
13 L.Ed.2d 684; and *Giordenello v.
d States* (1958), 357 U.S. 480, 78 S.Ct.
2 L.Ed.2d 1503.

re the facts given to the justice of the
sufficient to indicate that marijuana
ocated at the residence or in the car
d in front of the residence? We think

[14] Stemple's mere taking of an opaque green garbage bag out of a residence and the finding of a similar green garbage bag in an alley near the spot where the deputies lost sight of Stemple's truck were the facts presented to the justice of the peace. Such facts do not establish probable cause for the search of the residence. The connection between the bag found in the alley and the residence is tenuous at best.

[15, 16] Likewise, the search warrant application fails to set out any underlying facts or circumstances that establish probable cause to search the car parked in front of the residence. The only reference to the car in the search warrant is:

> ". . . that the resident of the above described duplex unit is the owner and was the driver of the described car when it arrived at the described residence early in the morning of January 11, 1980 and *your affiant believes that said vehicle was used to convey the marijuana and other dangerous drugs to the residence described. . .*" (Emphasis added.)

A mere affirmance of belief or suspicion by a police officer, absent any underlying facts or circumstances, does not establish probable cause for the issuance of a search warrant. See, *Application of Gray*, supra, 473 P.2d at 536; *Nathanson*, supra.

Absent probable cause, the searches of the house and car were in violation of the Fourth Amendment, and the evidence resulting from these searches is not admissible against the defendant. *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

Clearly, the introduction into evidence of the marijuana seized from the house and car constitutes reversible error since such evidence contributed to the conviction of the defendant. *State v. Langan* (1968), 151 Mont. 558, 445 P.2d 565; *State v. West* (1980), Mont., 617 P.2d 1298, 37 St.Rep. 1772. Since no other evidence introduced at trial would support a conviction, a new trial cannot be granted.

The judgment of the District Court is reversed and the cause dismissed.

MORRISON, J., concurs.

HASWELL, Chief Justice, concurring:

I concur in the result.

SHEEHY, Justice, concurring:

I concur in the result.

WEBER, Justice, dissents:

I would hold that the defendant does not have standing to contest the search of his car and the objects inside the car. A review of the search and seizure provisions of our code is enlightening. Section 46–5–101, MCA, describes the basis for a search and seizure and applies where a search is made incident to a lawful arrest, by the authority of a valid search warrant, under the authority of a right of lawful inspection, and of particular import here, "with the consent of the accused . . ." Here, section 46–5–101 is not applicable in any way. Note that if the defendant had consented to the search of his automobile, the code section would have been applicable. Section 46–5–102, MCA, describes the manner in which a peace officer may search following a lawful arrest, and again, this section is not directly applicable. Next, section 46–5–103, MCA, the section quoted in the majority opinion, provides in part:

> "No search and seizure, whether with or without warrant, shall be held to be illegal as to a defendant if:
>
> "(1) the defendant has disclaimed any right to or interest in the . . . object searched or the instruments, articles, or things seized." (Underscoring added.)

Section 46–5–103, MCA, is a codification of the rule established by this Court in *State v. Nelson* (1956), 130 Mont. 466, 304 P.2d 1110. The Court affirmed the refusal of the District Court to suppress evidence seized in a search of an automobile without a search warrant, where the defendant Nelson had disclaimed any ownership or right to possession of the car or of any property taken therefrom. This Court quoted from an earlier Montana case and stated:

> "What was said by this court in *State ex rel. Teague v. District Court* [1925], 73 Mont. 438, 441, 236 [P.] page 257, 258, rules this case so far as the motion to suppress is concerned. There this court said:
>
> "'Although the acts of the officers in searching this tunnel and seizing the still and mash found in it may have been unlawful as to the possessors of the tunnel, since relator disclaimed the right of possession of both the tunnel and its contents, he is not in a position to complain, as according to his own statements, he had no right in them and the acts of the officers therefore were not unlawful as to him. It is hardly necessary to cite authorities to sustain this determination, but reference is made to *Driskill v. United States*, 8 Cir., 281 F. 146, and *Keith v. Commonwealth*, 197 Ky. 362, 247 S.W. 42. In each of which a like result was reached under analogous facts.'
>
> "This is the rule throughout the country, see annotations in 24 A.L.R., page 1425; 32 A.L.R., page 415; 41 A.L.R., page 1151; 52 A.L.R., page 487; 88 A.L.R., page 365; et seq.; 134 A.L.R., page 831; 150 A.L.R., page 577." *State v. Nelson*, 130 Mont. at 471, 304 P.2d at 1113.

This decision has not been overruled or modified.

The same view is expressed in *Elledge v. United States* (9th Cir. 1966), 359 F.2d 404, in which the Court of Appeals denied the motion to suppress evidence, where, in response to an officer's question as to what was in a package, the defendant had said, "I don't know. It's not mine." The court stated in part:

> "Such disclaimer of ownership by the appellant is analogous to abandonment. Cf. *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, [698] 4 L.Ed.2d 668 (1960). In both cases the same message, by act or word, is delivered to the officer: that as to the actor or speaker there is no interest which would be invaded by search or seizure. Lack of warrant does not under these circumstances render search or sei-

zure unreasonable as to the actor or speaker." *Elledge v. United States*, 359 F.2d at 405.

In a similar manner, in *Rakas v. Illinois* (1978), 439 U.S. 128, 134, 99 S.Ct. 421, 425, 58 L.Ed.2d 387, 395, the Court stated:

"A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." (Underscoring added.)

An extended discussion of cases with similar holdings does not appear appropriate. We do note that Wayne LaFave, a leading authority on search and seizure, distinguishes between abandonment and disclaimer of ownership. LaFave takes the position that disclaimer of ownership should not be held tantamount to a waiver of Fourth Amendment protection, but notes that a number of courts have so held. W. LaFave, 3 Search and Seizure § 11.3 (1978, Supp.1981).

Recent United States Supreme Court cases involving the question of standing to challenge the legality of searches, have emphasized the importance of a defendant's legitimate or reasonable expectation of privacy in the premises or objects searched. *Rakas*, supra; *United States v. Salvucci* (1980), 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619; *Rawlings v. Kentucky* (1980), 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633. I am unable to see how the defendant could have had a reasonable expectation of privacy in opaque bags in the trunk of a car, when he had stated he did not own the car, he did not know who did own the car, and he did not know where the keys to the car's trunk were located.

The unfortunate result of the majority opinion is that, once again, reliable evidence establishing a clear basis for conviction is suppressed. The majority's broad application of the exclusionary rule has again exacted a substantial social cost. As stated in *Rakas v. Illinois*, 439 U.S. at 137, 99 S.Ct. at 427, 58 L.Ed.2d at 397:

"Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. (Citations omitted)."

I would hold that the District Court properly denied the defendant's motion to suppress the evidence obtained from the search of the car.

Harry G. and Lillian MARTZ, husband and wife, et al., Plaintiffs and Respondents,

v.

BUTTE-SILVER BOW GOVERNMENT, State of Montana, et al., Defendants and Appellants.

No. 81-237.

Supreme Court of Montana.

Submitted Oct. 27, 1981.

Decided Jan. 26, 1982.

Rehearing Denied March 9, 1982.

Property owners brought action against governmental unit and state challenging zoning ordinance. The District Court of the Second Judicial District, in and for the County of Silver Bow, Arnold Olsen, P. J., entered summary judgment for property owners, and defendants appealed. The Supreme Court, Weber, J., held that: (1) ordinance was not enacted in violation of Montana laws governing zoning, and (2) evidence presented material question of fact as to whether ordinance unconstitutionally excluded mobile homes and mobile home parks, thus, precluding summary judgment.

Reversed and remanded.

1. Zoning and Planning ⇐30

Jurisdictional area referred to in statutory sections indicating need for master plan for jurisdictional area is that of planning board. MCA 76-2-101 et seq., 76-2-201.

2. Zoning and Planning ⇐30

Where council of commissioners, in enacting zoning ordinance which covered the entire jurisdictional area of old city-county planning board, but no more, relied upon properly enacted comprehensive plan for entire jurisdictional area of planning board which developed that plan, ordinance was enacted in compliance with Montana law and did not conflict with statute limiting extension of municipal zoning to three miles beyond city limits of larger cities. MCA 76-1-501 et seq., 76-1-505, 76-2-101 et seq., 76-2-201, 76-2-310(2).

3. Judgment ⇐181(15)

In property owner's action against governmental entity, and state of Montana, challenging zoning ordinance, material issue of fact existed as to whether ordinance had unconstitutionally exclusionary effect upon mobile homes and mobile home parks, thus, precluding summary judgment.

Robert M. McCarthy argued, County Atty., Butte, for defendants and appellants.

Cannon, Parish & Sheehy, Helena, Ross W. Cannon argued and Edmund F. Sheehy argued, Helena, for plaintiffs and respondents.

WEBER, Justice.

Defendant appeals from summary judgment in the District Court of Butte-Silver Bow in which Butte-Silver Bow Ordinance No. 53 was found to be (1) invalid because it was enacted in violation of Montana laws governing zoning, and (2) unconstitutionally exclusive because it restricted mobile homes and mobile home parks to an impermissibly small percentage of the area zoned. We vacate the summary judgment and remand to the District Court for further proceedings.

The following issues are p
Court for review:

(1) Did the District Court
ing that Ordinance No. 53
in accordance with Montana
planning and zoning?

(2) Did the District Cour
Ordinance No. 53 unconstit
of its exclusionary effect o
and mobile home parks?

(3) Did the District Cou
granted plaintiffs' amend
summary judgment?

On March 14, 1972, the B
City-County Planning Bo
comprehensive master plan
Butte and portions of Silv
The master plan covered th
tional area of that Planning
accepted by both the city
the county government
months.

In May of 1977, the City
County of Silver Bow con
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was all of Silver Bow Coun
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In August of 1978, the
Butte-Silver Bow approved
dinance No. 53, which ha
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old City-Planning Board, bu
the time it was enacted, th
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board and no comprehensi
total jurisdictional area.

Ordinance No. 53 zones
134.3 acres comprising the
and land within four-and-o
the Butte city limits prior
Ordinance No. 53 permits n
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but permits mobile home p
eas zoned R-4. The minir
areas zoned R-4S is one ac
total area zoned is zoned